(1) Supreme Court, U.S.
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CASE NO._____

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term , 1997

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JACQUELINE J. MILLER-WAGENKNECHT,
Petitioner,

V.

VILLAGE OF DOYLESTOWN; WALTER MCINTOSH, in his individual capacity and as Chief of Police; LARRY H. SAMS, in his individual capacity and as Patrolman; GENE E. DANIEL, in his individual capacity and as Mayor,
Respondents

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On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Sixth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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Jacqueline J. Miller-Wagenknecht, Pro Se
174 Cheltenham Lane
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(330) 633-8010

HC PP

## QUESTIONS PRESENTED

Attorney Brent English was granted a continuance of the January 14, 1997 trial because he was not prepared for trial. No hearing was held or order given whereby petitioner would receive knowledge of the Court's action. Attorney Brent English was again not prepared for a trial date of March 3, 1997. Judge Patricia Gaughan imputed Attorney Brent English's conduct to petitioner, Jacqueline J. Miller-Wagenknecht, and dismissed the lawsuit with prejudice for failure to prosecute. Judge Gaughan refused to permit petitioner to give testimony or present evidence to rebut the presumption that Attorney Brent English's conduct /knowledge should be imputed to petitioner.

I. The Court Of Appeal's Interpretation of The Standard Of Review To Impute Wrongful Conducts of An Attorney To His Client According To Link V. Wabash 370 U. S. 626 (1962) Conflicts With The Second Circuit's , Seventh Circuit's, Eighth Circuit's , and Ninth's Circuit's Interpretation And Aggravates the Existing Split in the District Courts.

II. The Court Of Appeal's Interpretation That Attorney Brent English Was Petitioner's Agent And That Petitioner Is Attorney Brent English's Principal Is In Direct Conflict With The Standards Used In Agency Relationships To Determine Who Is Principal And Who Is Agent.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Jacqueline J. Miller-Wagenknecht, respectfully prays that a Writ of Certiorari issue to review the judgment below.

## OPINIONS BELOW

The March 6, 1997 Order of the United States District Court, Northern District of Ohio, Eastern Division is unreported and provided in Appendix A at page 20.

The April 29, 1998 Decision of the United States Court Of Appeals For The Sixth Circuit is unreported and provided in Appendix B at page 21.

The June 26, 1998 Order of the United State Court Of Appeals For The Sixth Circuit is unreported and provided in Appendix C at page 22.

## JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered April 29, 1998. A timely petition for rehearing with suggestion for hearing en banc was denied by the United States Court of Appeals on June 26, 1998. This petition is timely filed within ninety days of that date, per rule 13(1), Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

## CONSTITUTIONAL PROVISIONS

### Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by, Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### 42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

Petitioner, Jacqueline J. Miller-Wagenknecht (hereinafter "Miller-Wagenknecht") commenced the case at bar with the filing of her complaint on July 11, 1994. The complaint alleges a violation of 42 U.S.C. sec. 1983 by the four named defendants, the Village of Doylestown, chief of police Walter McIntosh, patrolman Larry H. Sams, and mayor Gene E. Daniel. Patrolmen Sams stopped Miller-Wagenknecht while she was driving her automobile and alleged that she was speeding. Sams called McIntosh to the scene of the stop and Miller-Wagenknecht

was handcuffed, taken to another city's police station, and arrested for speeding. During the stop and arrest McIntosh pushed Miller-Wagenknecht over the trunk of the car injuring her knee, twisted her shoulder, and kicked her in the rectal area. However the facts relevant to this petition are those of procedure. A more detail account is included in Miller-Wagenknecht's Petition for Rehearing and With Suggestion For Rehearing En Banc.

Miller-Wagenknecht engaged the law firm of Rubenstein, Novak, Einbund, Pavlik & Celebrezze to represent her claims against the defendants. The attorney assigned to the case was Attorney Nancy J. Fleming and the supervising partner was William J. Novak. The names of both Fleming and Novak appeared on the complaint. Attorney Fleming left the law firm in 1995 and started her own practice as a sole practitioner. Miller-Wagenknecht elected to have Attorney Fleming continue handling the case. This action was done with the blessing of Attorney William Novak. Unfortunately Attorney Fleming became deathly ill. In fact , Attorney Fleming had to request an extension of time to respond to a motion for summary judgment because she was hospitalized. Attorney Fleming was forced to withdraw because of her illness. Miller-Wagenknecht then retained Attorney Brent English to represent her.

The action was initially scheduled for trial on November 7, 1995 which was then changed to January 2, 1996. On November 8, 1995, the defendants moved for a continuance of the trial date. The motion was denied . However, the trial was rescheduled for August 20, 1996. Miller-Wagenknecht was not responsible for the continuance of the trial. This trial date was canceled because Judge Gaughan was new on the case. However, Judge Gaughan had been assigned this case seven (7) months earlier. (Appendix D 26, 30-31) The trial was rescheduled for January 14, 1997. The new January trial was continued one day before trial because English "was not prepared to go forward on January 14th".(Appendix D 26,31) No

hearing was held on January 14, 1997 whereby Jacqueline J. Miller-Wagenknecht would have received knowledge of Attorney Brent English's conduct. Rather, Miller-Wagenknecht was informed that the trial was continued because Judge Gaughan was ill. The trial was rescheduled for March 3, 1997 . Judge Gaughan informed Attorney English that there would be no more continuances.

On or about January 5, 1997 Miller-Wagenknecht was informed by one of her expert witnesses that Attorney English had still not contacted him. Miller-Wagenknecht began to monitor Attorney English's preparation for trial. The week prior to the March 3, 1997 trial it became abundantly clear that Attorney English was not prepared for trial(Appendix D 26, 33 ). Miller-Wagenknecht fired Attorney Brent English. Miller-Wagenknecht immediately contacted Judge Gaughan but she refused to take her phone calls or answer her inquiries. Miller-Wagenknecht began looking for new counsel to represent her at trial, but was unable to find new counsel because of the closeness of the trial date. (Appendix D 26, 33,37).

In the meantime , Attorney English filed a motion to withdraw as counsel with the court. Instead of seeking mandatory withdrawal because his employment was terminated, he filed an outrageous motion. This motion to withdraw was extremely prejudicial and put Miller-Wagenknecht in a very unfavorable and false light with the district court. After receiving the motion to withdraw, Judge Gaughan spoke with Attorney English not Miller-Wagenknecht. Judge Gaughan told Attorney English that Miller-Wagenknecht was to appear for trial with an attorney, try the case pro se, or settle the case, otherwise, the case would be dismissed.(Appendix D 26,32)

On March 3, 1997, the scheduled day of trial Miller-Wagenknecht was present at the trial. However, Miller-Wagenknecht was barred from all in chambers proceeding prior to trial which involved Attorney English, Attorney James Gutbrod,

and Judge Gaughan. It was during this private meeting that it was decided as to what would happen at trial. The trial transcript records the well orchestrated plan. (See entire trial transcript located in Appendix D)

The district court told Miller-Wagenknecht that if she wished to terminate English, then she would have to proceed pro se.(Appendix D 26, 32-33) English's motion to withdraw was granted.( Appendix D 26, 31-32,36)) . Miller-Wagenknecht moved for a continuance of the trial and the court denied her motion. (Appendix D 26, 36-37) . Miller-Wagenknecht stated that she was unable to try the case because she did not have an adequate knowledge of the law.( Appendix D 26, 37). The district court then dismissed Miller-Wagenknecht's claim for failure to prosecute. (Appendix D 26, 38). The abuse of process counterclaim was then settled and dismissed with prejudice. (Appendix D 26, 40). On April 29, 1998 The United States Court of Appeals For The Sixth Circuit affirmed the judgment of the District Court. On June 26, 1998, the United States Court Of appeals For The Sixth Circuit denied Miller-Wagenknecht' timely filed petition for Rehearing With A Suggestion For Rehearing En Banc. This timely filed Petition For Writ Of Certiorari followed.

## REASONS FOR GRANTING THE WRIT

The court's decision in this case conflicts with numerous circuit court holdings and the need for guidance from this Court is acute. This case is a timely and rare opportunity to provide that guidance. Moreover, the decision below is erroneous, and the issue that it addressed is important. The public expects attorneys and judges to be held to the same standard as everyone else. Only legal professionals can exonerate themselves for their misfeasance, malfeasance, and inappropriate conduct by imputing the act to the paying client. This practice must stop if the legal profession is to be found credible and trustworthy to the public.

I. The Court Of Appeals' Interpretation Of The Standard Of

Review To Impute Wrongful Conducts Of An Attorney To The Client According To Link v Wabash Railroad Co, 370 U.S. 626 (1962) Conflicts With The Second Circuit's, Seventh Circuit's, Eighth Circuit's , and Ninth Circuit's Interpretation and Aggravates the Existing Split of Authority in the District Court

II. The Court of Appeal's Interpretation That Attorney Brent English Was Petitioner's Agent And That Petitioner Is Attorney Brent English's Principal Is In Direct Conflict With The Standard's Used In Agency Relationships To Determine Who Is Principal and Who Is Agent.

A. The Sixth Circuit Decision conflicts with Other Circuit Decisions.

In S.E.C. v. McNulty 137 F.3d 732 (2nd Cir. 1998), the Second Circuit faced the same issue as the Sixth Circuit did in this case, under what circumstances will the conduct of an attorney be imputed to his client. The Second Circuit held that " Normally, the conduct of an attorney is imputed to his client, for allowing a party to evade "the consequences of the acts or omissions of [ ] his freely selected agent"" would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent" citing Link v. Wabash R. Co., 370 U.S. 626, 633-34, 82 S.Ct. 1386,1390, 8 L.Ed.2d 734 (1962). The Court further held that " where the attorney's conduct has been found to be willful , the willfulness will be imputed to the party himself where he makes no showing that he has made any attempt to monitor counsel's handling of the lawsuit". SEC v. McNulty at 740. Hence, the Second Circuit holds that whether or not an attorney's conduct is imputed to the client is a rebuttable presumption. This is in direct conflict with the Sixth Circuits contention that a client is vicariously liable for all his attorneys acts. Moreover, The Sixth Circuit will not permit any testimony or evidence to be presented by the client to dispute the attorney's version of the facts. In this case, Judge Gaughan refused to permit

Miller-Wagenknecht to speak, give testimony, or evidence to refute Brent English's allegations.

The Seventh Circuit agrees with the Second Circuit that a rebuttable presumption exists regarding imputing an attorney's acts to the client. In Catalfo v. Commodity Futures Trading Commission, 124 F.3d 203 (7th Cir. 1997) , the Seventh Circuit held that whether or not an attorney's wrongful acts are imputed to the client/ litigant is a rebuttable presumption . The Court stated that " Catalfo's situation does not illustrate good cause for his default whether his circumstance are interpreted as failed lawyer-client communications or as his own blind reliance on his lawyer without exercising any diligence of his own. Caltalfo did not allege anything more definite than these two constructions. Because, without more, " the law in this circuit is that an attorney's conduct must be imputed to his client in any context." Id. at 2 Hence, if Catalfo had produced sufficient evidence , or testimony to rebut the presumption, the Court would have not imputed the attorney's wrongful acts to him.

This Seventh Circuit holding is consistent with the standard established in Link v. Wabash, 370 U.S. 626,(1962). The Supreme Court imputed the attorney's acts to his client because the Court found that " there is nothing in the record before us to indicate that counsel's failure ... was other than deliberate or the product of neglect. Furthermore, the Court held that "... this is not a case in which failure to comply with a court order " was due to inability fostered neither by...[petitioner's] own conduct nor by circumstances within its control". Link v. Wabash at 636. Moreover, " petitioner's counsel received due notice... and cannot now be heard to say he could not have foreseen the consequences".Id.

In this case Judge Gaughan directed the proceeding of March 3, 1997 in a biased manner to assure that the court record would not contain any testimony or evidence that would exonerate Miller-

Wagenknecht and refute Attorney Brent English's false allegations. Judge Gaughan with the assistance of Attorney English and Attorney Gutbrod manufactured a totally biased record. Numerous motions were decided privately in chambers without the participant of Miller-Wagenknecht. The motions were decided solely on the representations of Attorney English and Attorney Gutbrod. (Appendix D 26, 28-32). Also, deals were made by Attorney English and Attorney Gutbrod off the record with the blessing of Judge Gaughan who knew that Attorney English was fired by petitioner. (Appendix 26, 28-29, 36-37) In addition, only Judge Gaughan, Attorney English, and Attorney Gutbrod were permitted to put on the record their alleged version of the facts which were often times extremely incorrect and biased.(Appendix D 26, 28-32, 32-36).

Furthermore, Attorney Brent English, an Ohio Attorney, knew the consequences of his actions for not being prepared for trial . In State v. Biggers, 188 Ohio App 3d 788, 791 the Appeals Court was faced with attorney misconduct the same as Attorney Brent English's misconduct. The court held that "given the fact that defense counsel admittedly did not prepare , it can be presumed that appellant was prejudiced by defense counsel's inaction, thereby warranting a holding of ineffective assistance of counsel". The court further held that"viewing all of the circumstances surrounding this case, we find the appellant received neither a fair trial or substantial justice". Likewise, in this case Judge Gaughan guaranteed that Miller-Wagenknecht would not receive any justice.

The Appeals Court ruling in this case to uphold the district Court's ruling is based upon the assumed fact that Miller-Wagenknecht had "explicit" knowledge in January 1997 that Judge Gaughan had granted a continuance to Attorney Brent English because he was not prepared. Furthermore, the Court assumes that Miller-Wagenknecht was informed by Brent English that the Court was enraged, would not grant anymore continuances, and her

lawsuit would be dismissed with prejudice if not ready for trial on March 3, 1997.

Does this Court honestly believe that there is one reasonable person in the entire world that would believe that Attorney Brent English who had already been paid in excess of $30,000.00 to represent Miller-Wagenknecht, would tell her that he had to beg Judge Gaughan for a continuance because he was not prepared for trial. Furthermore, what reasonable person would believe that Attorney Brent English would also tell Miller-Wagenknecht that Judge Gaughan agreed to the continuance with the understanding that there would be no more delays for any reason or the lawsuit would be dismissed with prejudice. Moreover, does anyone really believe that Attorney Brent English would tell Miller-Wagenknecht that the entire predicament was his fault and he was derelict in his responsibilities.

Had Attorney Brent English told Miller-Wagenknecht all of the above she would have fired him immediately. Or is it more believable , which is the truth, that Brent English called Miller-Wagenknecht and stated that the trial was continued once again due to Judge Gaughan's illness. Also, Attorney English told Miller-Wagenknecht that everything was under control and that she should go ahead with her previously scheduled vacation in Colorado. Why did Judge Gaughan not inform Miller-Wagenknecht of Attorney Brent English's conduct which is a blatant violation of DR 6-101(A)(2) and DR 6-101(A)(3) of Ohio Code of Professional Responsibility which states that: "A lawyer shall not handle a legal matter without preparation adequate in the circumstances "nor "neglect a legal matter entrusted to him". Rule 83.7 of the Local Civil Rules United States District Court Northern District of Ohio empowered Judge Gaughan to subject Attorney Brent English to appropriate discipline as the Court deemed proper for his misconduct. Judge Patricia Gaughan had decided to punish Miller-Wagenknecht for Attorney Brent English's conduct by dismissing

her lawsuit with prejudice.

Furthermore, why did Judge Gaughan not contact Miller-Wagenknecht directly, call a hearing before the Court, have an ex parte hearing, or take any other action to insure that Miller-Wagenknecht was aware of the potential ramifications of Attorney Brent English's conduct and the position of the Court. Instead, Judge Gaughan excluded Miller-Wagenknecht from all proceedings. Could it be that Judge Gaughan made her rulings based upon a personal friendship with Attorney English?

Judge Gaughan's actions from January 1997 through and including March 3, 1997 can only be perceived as condoning, endorsing, promoting, and enabling Attorney Brent English's sanctionable conduct to continue to Miller-Wagenknecht's detriment. Judge Gaughan permitted Attorney Brent English to submit an affidavit the sole purpose to exonerate himself of any wrongdoing which is a blatant violation of DR 6-102(A) of the Ohio Code of Professional Responsibility. DR 6-102(A) states that " a lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice".

Judge Gaughan alleges that Miller-Wagenknecht had personal and explicit knowledge of Attorney Brent English's request for a continuance because he was not prepared and the conditions surrounding the continuance. Miller-Wagenknecht had no knowledge that there was any problems. Rather the Court kept Brent English informed enabling him to create and manufacture a plausible scenario because he was not prepared for trial on March 3, 1997.

When Miller-Wagenknecht realized that Attorney Brent English was not prepared for trial , she fired him. Miller-Wagenknecht immediately contacted Judge Gaughan but she refused to take her phone calls or answer her inquires. Miller-Wagenknecht did have a meeting with William Novack with Rubenstein, Novak, Einbund, Pavlik, and Celebresse. Attorney

Novak was going to take the case only if Miller-Wagenknecht paid $55,000 cash that day. Attorney Novak did state that he had talked to Judge Gaughan and that she was extremely upset and the trial was going forward on Monday. What was Miller-Wagenknecht to believe, that an Attorney who had not been retained nor was Miller-Wagenknecht's agent was talking directly to Judge Gaughan who refused to speak to Miller-Wagenknecht. Or was it more probable , which Miller-Wagenknecht believed, that Attorney Novak was using a pressure sales tactic to extort higher attorney fees from her. Regardless, $55000.00 was an outrageous demand.

On the day of trial, March 3, 1997, Miller-Wagenknecht was barred from an in-chambers meeting that involved Attorney Brent English who was fired, Attorney James Gutbrod, and Judge Gaughan. Would any reasonable person believe that given Attorney Brent English's history before the Court that his private representations in chambers were in Miller-Wagenknecht's best interest. I think not!

Judge Patricia Gaughan, Attorney Brent English and Attorney James Gutbrod continued their well orchestrated theatrical performance. The proceedings were totally manipulated to insure that Attorney Brent English was permitted to exonerate himself and introduce lies about Miller-Wagenknecht on the record, that Attorney James Gutbord with the assistance of the Court was permitted to extort a settlement , and Miller-Wagenknecht was the sacrificial lamb and scapegoat to protect the legal system. Judge Gaughan's proceedings would insure that Miller-Wagenknecht was not credible and Attorney Brent English was the victim.(see entire trial transcript located in Appendix D at page 26)

Had Judge Gaughan permitted Miller-Wagenknecht to speak and present documents she had at trial, she would have been able to prove that Brent English was lying to the Court and fabricating a story to protect himself from disciplinary action. The Court permitted Attorney Brent English with eloquent speech, innuendos,

and lies, to create a gross misrepresentation of Miller-Wagenknecht to the Court as a *person not credible, unreasonable*, uncooperative, and attempting to perpetuate a fraud on the Court. Attorney Brent English also used his Motion For Leave To Withdraw As Attorney Of Record to bolster this false scenario. Attorney English had to destroy Miller-Wagenknecht's credibility before the Court, to make his representations of the facts believable.

In Tolliver v. Northrop Corp.,, 786 F.2d 316, 317-318 ( 7th Cir. 1986) , the Seventh Circuit was faced with a scenario analogous to this case. A court appointed lawyer for Tolliver quit or was let go because of irreconcilable differences about the merit of the Title VII lawsuit and the strategy for prosecuting it. The Court declined to appoint a second lawyer and told Tolliver that unless she retained counsel that she would have to represent herself. The Court granted Tolliver time to obtain new counsel. In open Court the Judge informed Tolliver of the discovery deadline Tolliver's newly retained attorney did not enter an appearance or file the answers. Tolliver's lawsuit was dismissed. Tolliver retained her third set of Counsel to appeal.

The Court held that "the district judge supervises the case and can make an astute judgment about whether the plaintiff's noncompliance is deliberate(and about whether more time would allow things to proceed). Furthermore, the Court held that a dismissal will stand "unless the judge was very far off base-if the judge relied on forbidden factors or omitted to consider some important relevant factor". Id.at 319.

In this case Judge Gaughan did more than omit to consider important relevant factors , Judge Gaughan refused to consider any testimony or evidence that would exonerate Miller-Wagenknecht . As a result, Miller-Wagenknecht was denied a ten day continuance to obtain new counsel. No delay in the proceedings were attributed to Miller-Wagenknecht. The greatest delay was by Judge Gaughan. Furthermore, Judge Gaughan dismissed Miller-Wagenknecht's

lawsuit without permitting her to enter evidence or testimony that would refute Brent English's allegations. Judge Gaughan based her decision on false representations by Attorney English that was an attempt to mitigate his liability in any potential malpractice suit as well as answering a potential complaint before the disciplinary committee. Such testimony by Attorney English could be considered forbidden factors because his actions and comments violates the Ohio Code of Professional Responsibility.

Moreover , Judge Gaughan's decision was based on the fact that she told her friend and colleague Brent English that no more continuances would be granted because he was not prepared for trial. In the Tolliver case Tolliver was given personal notice and a continuance to obtain new counsel. It was the fact she had personal knowledge and that she still had not complied with the discovery order that the dismissal was upheld. In this case, all discovery was complied with by Miller-Wagenknecht. On the day of trial Miller-Wagenknecht was barred from Chambers. Judge Gaughan was far off base when she denied Miller-Wagenknecht to be present and to participant on her own behalf in chambers prior to trial.

In Paik v. First, 67 F.3d 308 (C.A. 9(Cal.) 1995), the Ninth Circuit Court also maintains the standard that a rebuttable presumption exists. The Ninth District Court of Appeals upheld the District Court's dismissal of Paik's action because former counsel "... failed to respond to the Court's order to show cause why the action should not be dismissed". Once Miller-Wagenknecht began to proceed Pro Se, she should have been given the opportunity to show cause why her lawsuit should not be dismissed . Judge Gaughan denied Miller-Wagenknecht this procedural safeguard.

Furthermore, In Paik, the Court further held that its a "general proposition that an attorney's culpable conduct is imputed to the client ". In addition, "each party is bound by the acts of his lawyer-agent and is considered to have notice of all facts... which can be charged upon the attorney". However, the Court held that "

in applying this rule, courts have granted a client relief from an attorney's conduct only in very limited circumstances..." Id. Miller-Wagenknecht was denied the opportunity to testify or present evidence that attorney Brent English actions should not be imputed to her.

In Inman v. American Home Furniture Placement Inc., 120 F 3d 117, 118 (8th Cir. 1997), the Eighth Circuit Court of Appeals held that as a general matter parties are bound by their counsel's acts. However, the Court upheld Mann v. Lewis, 108 F.3d 145, 147 (8th Cir. 1997), stating that " Mann is an example of the violation not being severe enough to merit extinction of a party's claim". The Court in Mann further held that in deciding whether to dismiss a lawsuit with prejudice for failure to comply with a court order, " a District Court should weigh the court's need to advance its heavy docket against the consequence of irreversibly extinguishing the litigant's claim and consider whether any less-severe sanction could adequately remedy the effect of the delay on the court and the prejudice to the opposing party". Id.

The Court further held the appropriate sanction should be dismissal without prejudice. In this case a ten day continuance was not unreasonable. Furthermore, The Eighth Circuit Court held in U.S. v. Gleason, 98 F.2d 1183, 1187 (8th Cir. 1992) that " regardless of defendant's predisposition , the government's conduct in promoting a crime may be so outrageous as to violate fundamental fairness". Judge Gaughan was instrumental in Attorney Brent English perpetuating a fraud upon the court. Also, Judge Patricia Gaughan orchestrated the means whereby Brent English could openly violate the disciplinary rules of the Ohio Code of Professional Responsibility.

Hence, numerous district courts hold that imputing an attorneys' misconduct to his client is a rebuttable presumption and the client is not vicariously liable for the attorney's wrongful acts. Judge Patricia Gaughan abused her discretion by not

acknowledging that whether or not to impute Attorney English's actions to Miller-Wagenknecht is a rebuttable presumption . It cannot be assumed that because attorney Brent English had notice, it follows that Miller-Wagenknecht had notice.

As a result of the difficulty of securing appellate review, trial courts will only rarely obtain guidance from the federal courts of appeals on this issue, and the opportunities for this Court to review the issue will be few. This case presents such an opportunity, and the Court should take it.

B. The Court's definition of an Agency relationship is in direct conflict with the accepted standard to determine a principal and his agent.

Both the District Court and the Appeals Court erred when they held that Attorney Brent English was the Agent of Miller-Wagenknecht. Rather, Attorney Brent English and Judge Patricia Gaughan were agents of the United States Supreme Court, their Principal. Petitioner was a third party to this agency relationship. Miller-Wagenknecht was the client of Attorney Brent English who held the status of fiduciary to petitioner. Though the attorney-client relationship has similarities to an agency relationship , it does not have the necessary attributes to be classified as one.

The attorney-client is a unique relationship created to enable our adversarial system of justice to function. The attorney is an officer of the Court who can be privately retained as an advocate. The attorney-client relationship has unique attributes. One being an attorney-client privilege regarding communications. Whereas, a principal and his agent does not command such a special standing. Moreover, an attorney is responsible to the Court not his client and maintains an independent control over his actions. In addition, one of the clear duties of an agent is to obey instructions of the principal, if by a reasonable exercise of diligence and care they can be obeyed. National Bank V. City Bank 103 U.S. 668, 670(1880)

The mere use of the word " agent" by the Court in its decision

cannot be held to have the effect of making one an agent who in fact is not such. Board of Trade v. Hammond Elevator Co., 198 U.S. 424, 437-38, (1905) If the surrounding facts evidence an agency relationship, however artfully discussed, the parties cannot negate ,its existence by representing that it is something other than an agency relationship. Northern v. McGraw-Edison Co., 542 F.2d 1336, 1336 (8th Cir. 1976) Furthermore, whether one is the agent of another depends not on any mere paper recital, but on what he actually does. National Mutual B. & L. Assn v. Brahan, 193 US 635(1904)

"In assessing whether an individual occupies the status of an agent, it is necessary to review the facts and circumstances surrounding the individual's activities to determine whether the purported principal exerts the requisite control over the individual so as to create an agency". Northern v. McGraw-Edison Co.,. 542 F2d 1336 , 1343 (1976) " It is not necessary that the parties shall understand among themselves that their is an agency. 'If the relations exist which constitute an agency, it will be an agency , whether the parties understood it to be or not. Their private intentions will not affect it'." Huckabee v. Pullman Co.,. 8 F2d 43, 45(1925)

In order to establish that an agent has apparent authority to do the act in question, it must be established that (1) the principal had manifested his consent to the exercise of such authority or has knowingly permitted the agent to assume the exercise of such authority, (2) the third person knew of the facts and, acting in good faith, had reason to believe, and did actually believe, that the agent possessed such authority; and (3) the third person, relying on such appearance of authority, has changed his position and will be injured or suffer loss if the act done or transaction executed by the agent does not bind the principal. Wells Fargo Business v. Ben Kozloff, Inc., 695 F2d 940 (5th Cir. 1983).

In this case, Attorney Brent English and Judge Patricia

Gaughan are officers of The United States Supreme Court. Hence, the Principal a.k.a.. the United States Supreme Court has manifested its consent for its agents to exercise such authority via the Federal Rules . In addition the United States Supreme Court has knowingly permitted its agents to assume the exercise of such authority since both Attorney Brent English and Judge Patricia Gaughan are in good standing with the United States Supreme Court. Furthermore, Miller-Wagenknecht, as a third party to this agency relationship, knew of the facts, and acting in good faith, had reason to believe, and did actually believe, that attorney Brent English and Judge Patricia Gaughan were agents of the United States Supreme Court and possessed such authority as indicative of their agent status, attorney and Judge respectively.

Moreover, as a third person relying on such appearance of authority, Miller-Wagenknecht changed her position by entrusting her lawsuit to Attorney Brent English who was acting under the auspices of Judge Gaughan, agent of the United States Supreme Court . As a result , Miller-Wagenknecht was injured and suffered loss . The United States Supreme Court acting through its agent, Judge Patricia Gaughan, caused Miller-Wagenknecht, a third party, to believe that Attorney Brent English was acting properly and in her best interest. Miller-Wagenknecht relied on this information. The United States Supreme Court through its agent, Judge Gaughan, had explicit notice that its agent , Brent English was committing harmful acts that any reasonable person would understand that would cause harm to his client i.e. dismissal of the suit. Since, Agent Judge Gaughan did not inform this third party of Attorney Brent English's conduct, his acts are imputed to his principal, the Court. Miller-Wagenknecht's case was dismissed with prejudice because the wrongful acts done by the Court's agents did not bind the principal. Specifically, the explicit notice, contumacious conduct, lack of preparation for trial must be imputed to and bind the principal, the United States Supreme

Court.

The Appeals Court was wrong when it assumed that an agency relationship exists in an attorney-client business relationship. An attorney is a privately retained officer of the Court who acts as the professional representative of his clients and represents them in court proceedings and other legal matters. Powell v. Alabama, 287 U.S. 45 (1932) This contractual relationship is to purchase the services of a professional. Such relationship is analogous to a person who engages an insurance agent to procure insurance coverage at the most appropriate premium. The insurance agent acts as the advocate and liaison for the insured to the insurance company regarding matters under the terms of the contract. However, the insurance agent by Ohio law is the agent of the insurer not the insured(client) while acting in this capacity . Specifically, Ohio Revised Code 3929.27 states that " A person who solicits insurance and procures the application therefore shall be considered as the agent of the party, company, or association thereafter issuing a policy upon such application or a renewal thereof, despite any contrary provision in the application or policy". For over a hundred years the Ohio Supreme Court has held that the mistakes of the insurance agent become the mistakes of the insurance company and not the insured. (Farmers Ins. Co. V. Williams, 39 OS 584 (1884).

Similarly, an attorney has a relationship as advocate and liaison to the Court for his client. This conduct must be imputed to the Court and not the client. Would this Court have the inappropriate actions of any professional rendering services to a private paying client be imputed to him. If a patient privately pays for the services of a medical doctor does the doctor become the agent of the patient? No! If the doctor commits insurance fraud in his billing practices with an insurance carrier is his illegal actions imputed to the private paying patient? No! The patient is merely purchasing services as a consumer purchases a product such as a

Television. Once the Court began this slippery slope anyone who renders a specialized service(mechanic, beautician, Realtor, etc.) would become the client 's agent with carte blanche authority.

Though an attorney has a unique status, his conduct is controlled and regulated by his principal the United States Supreme Court. In this case, Miller-Wagenknecht, the alleged principal could not fire Attorney Brent English or talk directly to the Court. If a true agency relationship existed Miller-Wagenknecht would have had all reasonable control over Attorney English and be able to regulate his actions. Since Miller-Wagenknecht possessed no such authority, no agency relationship existed.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Jacqueline J. Miller-Wagenknecht
Pro Se
Petitioner
174 Cheltenham Lane
Munroe Falls, Ohio 44262
(330) 633-8010

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| Jacqueline J. Miller -Wagenknecht | ) | Case No. 5:94CV1422 |
| | ) | Filed |
| | ) | 97 March 6 P.M. 12:26 |
| Plaintiff | ) | Cleveland |
| | ) | Judge Patricia A. Gaughan |
| The Village Of Doylestown et al., | ) | ORDER |
| Defendants | ) | |

The above-captioned case was scheduled for trial on Monday, March 3, 1997, at 10:00 a.m. A panel of 20 jurors was summoned to appear on that date.

The complaint was dismissed an March 3, 1997 as Plaintiff was not prepared to proceed. The counterclaim was settled after the dismissal. Therefore,

IT IS ORDERED that, pursuant to Local Rule 1:3.2, the amount of $1,200.89 which is the cost of the attendance of the jurors, shall be assessed to plaintiff in accordance with the Order of Dismissal entered herein .

/s PATRICIA A. GAUGHAN
United States District Judge

APPENDIX A

97-3386

UNITED STATE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| JACQUELINE J. MILLER-WAGENKNECHT | ) | FILED |
| | ) | JUN 26, 1998 |
| | ) | LEONARD GREEN, |
| Plaintiff-Appellant, | ) | CLERK |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| VILLAGE OF DOYLESTOWN, ET AL., | ) | |
| Defendants-Appellees. | ) | |

BEFORE: MERRITT, JONES, AND NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for hearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised, in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/S Leonard Green , Clerk

APPENDIX B

No. 97-3386

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | |
|---|---|
| JACQUELINE J. MILLER-WAGENKNECHT<br>Plaintiff-Appellant,<br><br>v.<br><br>WALTER MCINTOSH,<br>Defendant-Appellee | )<br>) ON APPEAL FROM<br>) THE UNITED STATES<br>) DISTRICT COURT FOR<br>) NORTHERN DISTRICT<br>) OF OHIO<br>)<br>) |

Before: Merritt, Jones, and Norris, Circuit Judges.

MERRITT, Circuit Judge. Plaintiff Jacqueline J. Miller-Wagenknecht appeals from the District Court's decision to dismiss her case. We find that the District Court did not abuse its discretion by dismissing the case after the court explicitly warned plaintiff that her case would be dismissed if she was not ready to proceed to trial on March 3, 1997. We therefore affirm the decision of the District Court.

Plaintiff brought this action for violation of her Fourth, Fifth, and Fourteenth Amendment rights under 42 U.S.C. Sec 1983 against the Village of Doylestown, Walter McIntosh, Larry Sams and Gene Daniel on July 11, 1994. At that time, the case was assigned to Judge Bell, who ordered that discovery be completed by June 1, 1995 and set a trial date of November 7, 1995. The trial date was then rescheduled several times for various reasons. The case was transferred from Judge Bell to Judge Gaughan, and Judge

Gaughan set the new trial date for January 14, 1997. Judge Gaughan also granted summary judgment to all the defendants except Walter McIntosh.

On January 13, 1997, plaintiff's attorney, Brent English, asked to reschedule the trial because he was not prepared to go forward. The District Court granted a continuance to March 3, 1997, with the explicit stipulation that "[t]here will be no further continuances on behalf of the Pltf." J.A. at 302. On March 3, 1997, Judge Gaughan explained that when she granted the continuance on January 13, 1997, she did so "very reluctantly" and she indicated "that I would continue it to March 3rd of '97 but that I would not continue it again for any reason whatsoever, and I made that very clear to both sides, that because this case was an old case, it had been set so many times for trial, I did not want to continue the trial but agreed to do so given the representation by Mr. English". Tr. at 7-8; J.A. at 283-84.

Five days before the March 3, 1997 trial date, Brent English, plaintiff's attorney, filed a motion to withdraw because he had been fired by the plaintiff. Before permitting Mr. English to withdraw, the District Court stated: "I also want the record to be clear that I had indicated to Mr. English last week that Miss Miller-Wagenknecht must have an attorney here today or proceed pro se or the case was going to be dismissed with prejudice, so the plaintiff certainly had notice of what this court intended to do ." Tr. at 9, J.A. at 285. At the hearing, plaintiff argued that she had to fire her attorney because he was not prepared. English explained that he had spoken to many witnesses and simply found that there was no case, and plaintiff fired him because she did not like his assessment of the case. Although plaintiff wanted to contest Mr. English's version of the facts, the District Court cut her off. The court explained that no discussion was necessary because the court would permit Mr. English to withdraw once plaintiff had confirmed that she still wished to fire him even though she knew the consequences.

After plaintiff confirmed that she still wished to fire English, the District Court asked plaintiff if she would like to proceed pro se. The plaintiff said she would proceed pro se and then asked for a continuance of the trial. The District Court denied the motion. Plaintiff then told the court that she could not proceed to trial because she was not a lawyer and did not know how to proceed. The District Court then dismissed plaintiff's case.

We review a District Court's dismissal of an action for failure to prosecute under the abuse of discretion standard. Coleman v. American Red Cross, 23 F.3d 1091, 1094 (6th Cir. 1994). Although this Circuit in Harris v. Callwood, 844 F.2d 1254, 1256 (6th Cir. 1988) held that such dismissals represent a harsh sanction to be carefully reviewed on appeal, we held that a District Court could dismiss a case if the derelict part has been given explicit notice that "dismissal is contemplated." or if that party engaged in "bad faith or contumacious conduct." Id. At 1256. In this case, plaintiff was given explicit notice in January that the District Court would not grant any more continuances. She was also given notice the week before trial that if she fired her attorney she would have to proceed pro se with her case anyway or face dismissal. She chose to fire her attorney, and then told the court that she could not proceed pro se. In light of the explicit warning, we do not find abuse of discretion in this case.

Plaintiff argues that the District Court should not have dismissed her case because her lawyer was not prepared to go to trial and the Court is therefore punishing her for her lawyer's lack of preparation. In Link v. Wabash R.R., Co:, 370 U.S. 626 (1962), the Supreme Court addressed this same argument :

[t]here is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely

selected agent. Id. At 633-34.

Plaintiff also argues that the District Court abused its discretion by refusing to grant her a continuance. The District Court warned plaintiff in January she would receive no further continuances. Thus, plaintiff was well aware that she would not receive a continuance on March 3, 1997.

We find that the District Court did not abuse its discretion in dismissing plaintiff's case, and accordingly affirm the judgment of the District Court.

FILED
April 29, 1998
/s Leonard Green, clerk

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | |
|---|---|
| Jackie J.Miller-Wagenknecht, | ) |
| Plaintiff, | ) Judge Patricia Gaughan |
| | ) Cleveland, Ohio |
| vs. | ) |
| | ) Civil Action |
| Village of Doylestown, ET AL., | ) Number 94CV1422 |
| Defendant. | ) |

- - - - - - - - - - - - - -

Transcript of Proceedings had before
The Honorable Patricia A. Gaughan,
Judge of Said Court
On Monday, March 3, 1997

- - - - - - - - - - - -

APPEARANCES:

| | |
|---|---|
| For the Plaintiff: | Brent English, Esq.<br>Jackie Miller-<br>Wagenknecht, Pro Se |
| For the Defendant: | James J. Gutbrod, Esq.<br>Perantinides & Nolan<br>300 Courtyard Square<br>Akron, Ohio 44308 |

APPENDIX D

Official Court Reporter: Susan k. Trischan,
RMR, CRR
U.S.District Court-
Room 539
201Superior Ave.
Cleveland, Ohio
44114-1201
216/696-5899

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

Monday, March 3, 1997, 10:25 A.M.

THE COURT: Please be seated.

We are here in the matter Jacqueline J. Miller-Wagenknecht versus Village of Doylestown, et al., Case Number 96CV1422.

Present in Court is Miss Miller-Wagenknecht; is that correct, ma'am?

MS. MILLER-WAGENKNECHT: Yes.

THE COURT: Represented by her attorney Mr. Brent English.

Representing all defendants is Mr. James Gutbrod.

MR. GUTBROD: Your Honor, there is only one defendant remaining and I represent him.

THE COURT: Well --

MR. GUTBROD: And also the counterclaimants.

THE COURT: The counterclaims, that's what I meant. There is only one aspect of the complaint remaining and that is the issue of excessive force, Officer -- is it McIntosh?

MR. McINTOSH: Yes, ma'am.

THE COURT: You are here, is that correct, sir?

MR. McINTOSH: Yes, ma'am.

THE COURT: You do have counterclaimants, and correct me if I am wrong, it's Mr. Daniel --

MR. GUTBROD: Yes.

THE COURT: -- Officer Sams and the Village of Doylestown?

MR. GUTBROD: That's correct, your Honor.

THE COURT: And they are present?

MR. GUTBROD: They are not present here but they can be present as soon as the trial starts.

THE COURT: All right. I have before me a number of motions. I have indicated to counsel my rulings on those motions and let me state those for the record.

There is a motion in limine to exclude plaintiff's expert witnesses.

Correct me if I am wrong, Mr. Gutbrod, but you were not -- you had filed a motion to compel, I believe, on December 26th regarding taking the depositions of the experts and at the same time you also filed a motion in limine to preclude them from testifying, am I correct?

MR. GUTBROD: I believe that's correct, your Honor.

THE COURT: I denied the motion in limine. However, I did indicate that if plaintiffs counsel was to respond promptly to the request for depositions and if they were promptly produced, the witnesses could testify. However, if counsel failed to respond promptly to the requests for depositions, the witnesses would be excluded from testifying.

It's my understanding, according to your motion in limine, that you had set up a time for the plaintiff's experts to be deposed and yet they were informed by the plaintiff - not counsel, but by plaintiff -- not to appear and in fact they did not appear to testify.

MR. GUTBROD: That's correct, your Honor.

THE COURT: And you do not have any expert reports in lieu of the testimony; is that correct? I mean there was an agreement that you would take their deposition testimony and then they could be produced at trial even though there were no reports; is that right?

MR. GUTBROD: That's correct, your Honor.

THE COURT: All right. In light of all of that, I did in fact grant the motion in limine to exclude plaintiff's expert witnesses.

There is a motion in limine regarding inadmissible hearsay. This Court entered a ruling of unopposed and granted on today's date, March 3rd.

There is a motion for protective order regarding medical records of Walter McIntosh. This Court granted that motion in light of the defendant's representation in his 2/27/97 motion in limine that he is not making a claim for any medical or psychological damage. And I also indicated that if the door was opened, however, this Court would then reconsider the ruling and allow the reports, the records to be produced to plaintiff.

You understand that ruling, Mr. Gutbrod?

MR. GUTBROD: I do, your Honor.

THE COURT: All right. There is a motion in limine again relating to the medical records that corresponds to that motion for protective order. This Court granted that motion.

MR. GUTBROD: Your Honor.

THE COURT: I believe the motion was not only medical records but any evidence to that effect, medical or psychological.

THE COURT: You are correct. You are correct.

Motion to amend counterclaim, it was opposed by the plaintiff. I denied the motion to amend as being untimely.

I have one last motion before me and that is a motion for leave to withdraw as attorney of record, and this motion has been filed by Mr. English.

I do want to indicate for the record the history of this case.

This matter was originally filed on July 11th of 1994 and this case was assigned to Judge Sam Bell. On February 16th 1995, Judge Bell ordered that discovery was to be completed by June 1st of 1995. He also set a trial date of November 7th, 1995 on a two week standby.

On June 26th 1995 that order was vacated , a new order was put on by Judge Bell, discovery was to be completed by August 11th 1995 and jury trial was to commence on January 2nd of 1996.

On October 11th of 1995, plaintiff's counsel, William J. Novak, withdrew as counsel and attorney Nancy Fleming was substituted as counsel. On November 8th of 1995, a motion by defendants to continue trial, the trial being set for January 2nd, 1996, was filed, However, Judge Bell denied defendant's motion to continue the trial in an order of November 17th, 1995.

On December 20th of '95 the Judge held a status conference or a settlement conference, I'm not sure which one, and at that time he indicated that he would allow discovery to be reopened and completed by February 12th of 1996. Jury trial was rescheduled to August 20th of 1996 on a two week standby.

On February 13th there was a second substitution of counsel -- excuse me -- the third attorney on the case, correct, February 13th, Nancy Fleming, attorney, was terminated and Brent English who is present here today was substituted as counsel. Prior to that time, a motion for summary judgment had been filed and a brief in opposition had been filed.

Once Mr. English came into this case on September 16th of '96, a supplemental affidavit had been filed by plaintiff in opposition to defendant's motion for summary judgment. This Court did not allow the affidavit as being untimely.

This Court on October 21st of '96 set this for -- and I should state, and I apologize, this Court was transferred this case

by Judge Bell when I came on board the Federal Court and that was on January 19th, '96 and at that time the trial date was canceled since I was new on the case.

On October 21st, '96, this Court had already issued a ruling on the motion for summary judgment and in a final pretrial set this for trial on January 14th of '97.

Mr. English filed a motion to continue the trial on grounds of a pre-existing trial conflict. That motion was denied by this Court as not being timely. However, a day before trial was to begin, and that was January 13th of '97, this Court did in fact have a conference with both counsel, Mr. English asked that I reschedule this -- reschedule the trial because he was not prepared to go forward on January 14th. This Court very reluctantly, and I emphasize "very reluctantly," indicated that I would continue it to March 3rd of '97 but that I would not continue it again for any reason whatsoever, and I made that very clear to both sides, that because this was an old case, it had been set so many times for trial, I did not want to continue the trial but I agreed to do so given the representations by Mr. English.

Now, five days before trial -- and when I say five day, today is march 3rd, five of those days -- excuse me, two those five days were weekend days -- I received a motion for leave to withdraw as attorney of record. I have indicated in chambers to counsel that I would not allow Mr. English to withdraw under any of the permissive sections of withdrawal under the disciplinary rules. However, Mr. English indicated in his motion and indicated orally to me that he had been fired and he had been fired on more than on occasion.

Mr. English; is that correct?

MR. ENGLISH: That is correct, your Honor.

THE COURT: I indicated to Mr. English that I would not let him out of the case yet , and the reason I did not want him off the case yet is I wanted Miss Miller-Wagenknecht to understand all

of the consequences of firing Mr. English, and before I formally entered an order granting the motion for leave to withdraw on the basis of the disciplinary rule requiring mandatory withdrawal, I wanted to make sure, ma'am, that you understand all of these consequences.

I indicated to you, Mr. English, in chambers, that you were to inform the plaintiff that she has every right to fire you, and that I will dismiss you from this case if she still wanted to fire you. However, her options would then be she could proceed pro se or this case -- she would settle the case or the case would be dismissed with prejudice.

Mr. Gutbrod, you indicated to this Court that that is what you would be asking of this Court if Miss Miller-Wagenknecht was not prepared to go forward today; is that correct?

MR. GUTBROD: If in fact that's the case, your Honor, we will move for dismissal with prejudice.

THE COURT: I also want the record to be clear that I had indicated to Mr. English last week that Miss Miller-Wagenknecht must have an attorney here today or proceed pro se or the case was going to be dismissed with prejudice, so the plaintiff certainly had notice of what this Court intended to do.

Mr. English, I informed you that I wanted you to go out, inform the plaintiff of her options. You did so; you came back to me and you indicated that your client or Miss Miller-Wagenknecht does in fact wish to fire you ; is that correct?

MR. ENGLISH: That is absolutely correct.

THE COURT: Miss Miller-Wagenknecht; is that correct, do you still wish to fire Mr. English and do you understand what your options are?

MS. MILLER-WAGENKNECHT: Shall I stand, your Honor?

THE COURT: Yes.

MS. MILLER-WAGENKNECHT: I believe I understand

my options, but unfortunately I've been placed in a very awkward position because again my attorney was not prepared, and I contacted him repeatedly since the case was postponed for January 14th and asked him to get in touch with the witnesses and to prepare the depositions as I had been asking him since October, November and December of last year.

So in light of everything, I understand and realize what you are saying to me and I have talked to several attorneys, but because of the limited amount of time and the financial obligations to retain other counsel, I have not retained other counsel at this moment. So I do understand that, you know, if I continue I'll be continuing pro se, but I have no alternative other than to fire Mr. Brent English.

THE COURT: Mr. English, do you wish to make any statement to the Court?

MR. ENGLISH; Yes, your Honor. I would like the record to reflect what the facts are as opposed to what was just said.

Your Honor, this is an excessive force case, as you are certainly aware, and one of the problems that I have had in the case is that after my initial trial preparations and my consultations with the witnesses who the plaintiff had identified as her fact witnesses as well as her expert witnesses, I was receiving widely disparate notions of what the facts were compared to what they had been represented to me by my client. So as a result of the continuance, which I respectfully requested from the court and which you I admit reluctantly granted, I endeavored to go to each of the experts to find out what their testimony would be and I urged and made sure that Miss Wagenknecht was present so that there was not any miscommunications.

And we in fact met with the psychiatrist Robert Weiss four separate times to try to elicit whatever his testimony would be and to clear up what appeared to be radically different versions of what he was going to testify to.

As a result of those conversations, I ultimately concluded

that he could not be called as a witness other than simply as a background witness, but could not make the causal connections that the law required.

In addition, there was an orthopedist who we spoke to at some length and I attempted to reach him by telephone a number of times. He was extremely uncooperative. Ultimately Miss Wagenknecht and I went to his office in Akron. This is in the intervening period between when the last trial date was set and today. The doctor would not see me, he would not talk to Miss Wagenknecht initially, in fact said a number of things that appeared to be disparaging about her and as a result of that were outside in the hallway and the doctor came out and actually had a discussion with us and at that point made this very clear, that he could not and would not testify to the facts that were necessary in this case.

In addition, there are two other psychologists who are involved in the case whose records I have reviewed extensively. One of them is in North Carolina. We made an effort to go see her in North Carolina but we were unable to do so for scheduling reasons, so we had a conference call during which a number of obviously important questions were asked, and during the middle of that conversation my client hung up, refused to participate any further in the discussion and I concluded the discussion.

The other expert is apparently in the State of Florida. I've asked for a release so that I could take to him, he has his own personal problems, and I have never been given a release and therefore have never had an opportunity to discuss the matter with them.

And the last expert is a psychologist in North Olmsted who I have in fact met with with Miss Wagenknecht and went over all of the facts with. Based upon my -- also in addition I went to Doylestown with Miss Wagenknecht and me with a number of people there who claimed to be witnesses or who she thought would potentially support her claims, including two eyewitnesses

who are on our witness list. And the eyewitnesses would not permit my client in their house. However, they did graciously invite me in and I spent approximately 45 minutes discussing the facts with them. And I also discussed with a number of other potential witnesses what they knew or didn't know. Most of these witnesses were extremely uncooperative or simply had no information that was pertinent to the case.

In light of that, I gave advice which I cannot tell you about, but I gave advice as to how I thought this case should be resolved, and my client would not take that advice, would not listen to the advice and became personally very abusive toward me and my staff, and as a result she ultimately fired me when she didn't like the advice she was getting.

So I want the record to be very clear, not only did we "get prepared," but in fact talked to every witness who we thought had any pertinent information and evaluated that independently and objectively, which is my duty as a lawyer. And if I can't go forward because I don't have the facts or law to support me, I have an obligation not to defraud the Court or not to say things to the jury that I believe are not correct, and as a result I ask the Court for leave to withdraw.

THE COURT: All right. Miss --

MS. MILLER-WAGENKNECHT: Your Honor.

THE COURT: Miss Miller-Wagenknecht, you indicated you wished to proceed pro se. You understand that there is a complaint with one aspect remaining which is the excessive force claim, and there is also an abuse of process counterclaim.

Are you going to proceed pro se?

MS. MILLER -WAGENKNECHT: Your Honor, if I may say something, I respect and understand Mr. English's right to speak and make the comments that he just made, but they are extremely incorrect.

THE COURT: Well --

MS. MILLER-WAGENKNECHT: And I have some documentation that proves otherwise that are direct from the witnesses, letters that were faxed from --

THE COURT: Regardless, you have indicated to me that you wish to fire him.

MS. MILLER-WAGENKNECHT: That's correct.

THE COURT: Then for whatever reason, whether your version is accurate or whether Mr. English's version is accurate, I simply want to know hat you want to do here, ma'am.

You have just fired him, you have indicated to me in open court -- I've given you every opportunity to change your mind on that.

MS. MILLER-WAGENKNECHT: Yes.

THE COURT: And you have not.

Mr. English, you may leave.

MR.ENGLISH: Thank you, your Honor.

THE COURT: Now, in regards to proceeding, are you going to present evidence on your claim?

MS. MILLER-WAGENKNECHT: Mr. English also indicated when we met in the foyer that I was permitted to ask for a continuance.

THE COURT: You are permitted to ask. I made it clear last week, I made it clear this morning, I will not continue this case.

Mr. Gutbrod, you have made it very clear that you are going to strenuously object to any request for a continuance; is that correct?

MR. GUTBROD: That's absolutely correct.

THE COURT: You have done that out -- off the record in the presence of Mr. English and I just want to make sure the record is clear on that.

MR. GUTBROD: For the record, your Honor, we would strenuously object to any continuance.

THE COURT I will not, I will not continue you case. You

knew that last week.

So how do you wish to proceed?

MS. MILLER-WAGENKNECHT: Well, since I'm not an attorney and I don't have the abilities nor the knowledge of the law, even though that I know that I have a claim and I have tremendous documentation to prove it, I an not able to, you know, try the case myself unfortunately. Again I guess I would ask for a continuance of ten days.

THE COURT: Well, you know, and I want the record to be clear that Miss Miller-Wagenknecht knew this Court's position because in fact two attorneys were contacted; I had a conversation with one of them and I indicated to him my position. He had told me that he had already been informed by Miss Miller-Wagenknecht that this case was going to go forward on Monday, which is today, March 3rd, and that he would let me know if he would be taking on this case. He was kind enough to call my office Friday afternoon to inform us that he would not be taking the case.

So I just want the record to be very clear that everybody knew this Court's position last week and it's not coming as a surprise to anyone on the morning of trial.

In light of the representations made by Mis Miller-Wagenknecht -- and, ma'am, I hope I understand this correctly -- you are indicating that you want a continuance, I'm denying your motion for continuance, and you are indicating you cannot go forward on your claim, is that correct, or do you wish to proceed pro se; in other words present your evidence without an attorney assisting you?

MS MILLER-WAGENKNECHT: I don't have the ability present the evidence without an attorney assisting me because I don't know what per se is permissible and I don't know the rules of courts, your Honor.

THE COURT: But my question is, ma'am, do you wish to proceed pro se on your claim? I need a yes or no answer to that.

MS. MILLER-WAGENKNECHT: No I don't.

THE COURT: So you will not be presenting any evidence; is that correct?

MS. MILLER-WAGENKNECHT: That's correct, because I don't have the ability to do so, ma'am.

THE COURT: Do you understand, ma'am, that there is a counterclaim here?

MS. MILLER-WAGENKNECHT: Yes, I do.,

THE COURT: All right. Mr. Gutbrod, you have indicated to this Court that you do no intend to dismiss the counterclaim. However, you did indicate to Mr. English to relate to Miss Miller-Wagenknecht that you would be willing to discuss a settlement of the abuse of process claim; is that correct?

MR. GUTBROD: That is correct.

THE COURT: Again I want Miss Miller-Wagenknecht to have all of the information before I formally --

MR. GUTBROD: That's correct.

THE COURT; -- enter any order here.

MR. GUTBROD: I represented that to the Court this morning, and I stand by that.

THE COURT: All right. And you were informed of that, correct, ma'am.

MS. MILLER-WAGENKNECHT: That's correct.

THE COURT: All right. I am going to dismiss the claim of excessive force with prejudice in that plaintiff has failed to prosecute this matter.

I am going to give you folks time to discuss the counterclaim and see if you can in fact proceed or, I'm sorry, to see if you can in fact settle that matter. If you cannot settle it, ma'am, you will have one of two options; either proceed pro se in defending that counterclaim or, secondly, if you wish to not defend it, I will listen to the testimony ex parte and I will make a determination if there is sufficient evidence to substantiate your

counterclaim and I will make a ruling accordingly, or a jury will, depending upon what you desire is.

I will give you time to talk.

MS. MILLER-WAGENKNECHT: Thank you, you Honor.

MR. GUTBROD: Thank you.

(Recess taken)

THE COURT: Indicated that I would give the parties time to talk regarding the counterclaim and I do want to make it clear, I understand that Mr. Miller-Wagenknecht, who was a party at one time, is an attorney and most certainly could sit, could represent his wife but -- and/or could sit and advise her if she wished to go pro se on the complaint or the counter claim.

I have hear, however, that there is a settlement regarding the counterclaim and, Mr. Gutbrod, if you would state specifically what your understanding of that agreement is and then I will turn to Mrs. Miller-Wagenknecht and ask her if that is her understanding of the settlement agreement.

MR. GUTBROD: Judge, our settlement demand was that we would be willing to dismiss our counterclaim for abuse of process with prejudice with the -- with language in the journal entry, the order from this Court, that Mrs. Miller-Wagenknecht is to stay 1500 -- is to stay 1500 feet away from any of the individual defendants; that is to say, she is not to intentionally come within 1500 feet of any of the individual defendants, and that she is not to contact or request that her husband contact any former employers or relatives of any of the three individual defendants.

THE COURT: Mrs. Miller-Wagenknecht, is that your understanding of the settlement agreement?

MS. MILLER-WAGENKNECHT: That is my understanding.

THE COURT: And are you in agreement with this?

MS MILLER-WAGENKNECHT: I am in agreement with that, but my only concern is that Mr. McIntosh will intentionally

come with 1500 feet of me because based on his past actions.

THE COURT: M'am, I believe Mr. Gutbrod made it very clear it would have to be an intentional act on your part.

MS. MILLER-WAGENKNECHT: Okay.

THE COURT: Understanding that, are you entering into the settlement agreement?

MS MILLER-WAGENKNECHT: Yes, I am.

THE COURT: Mr. Gutbrod, on behalf of your clients, you are entering into this settlement agreement?

MR. GUTBROD: I am, your Honor.

THE COURT: Which means your clients are; is that right?

MR. GUTBROD: On behalf of Mr.McIntosh, Mr. Sams, Mr. Daniel and the Village of Doylestown we are entering into this settlement agreement as set forth on the record.

THE COURT: All right. Then as to the counterclaim, it is settled and dismissed with prejudice, each party to bear own costs.

MR. GUTBROD: And we can submit an entry, your Honor, with the language to that effect?

THE COURT: Well, you may. I don't know if it's necessary because we have something even better, we have it on the record, but of course you may.

MR. GUTBROD: Thank you, your Honor.

THE COURT: Good luck to you both,, everybody.

(Court adjourned)

## CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/S Susan K. Trischan
Susan K. Trischan, Official Court Reporter
U.S. District Court - Room 539
201 Superior Avenue
Public Square
Cleveland, Ohio 44114
(216) 696-5899

LOCAL RULE 83.7

Any member of the Bar of this Court may, for good cause shown and after having having been given an opportunity to be heard, be disbarred, suspended from the practice for a definite time, reprimanded, or subjected to such other discipline as the Court may deem proper. Any person aggrieved by the conduct of any person practicing before this Court (other than a pro se litigant) may file a grievance with the clerk.

Whenever a grievance is filed with the Clerk or the Clerk receives notice from the Supreme Court of Ohio or from an appropriate disciplinary body of any other state or from any federal court that any member of its Bar has been disbarred , suspended from practice, or convicted of a felony in any other court, the Clerk shall forthwith determine whether such individual has been admitted to practice before this Court and shall forward such grievance or notice, any accompanying documentation, and information as to the status of such individual in this Court to the appropriate Committee of this Court. The chairperson of the Committee shall immediately issue an order to such individual to appear before the Committee to show cause why he or she should not be subjected to such discipline as the Court deems proper. The chairperson shall not be obligated to issue a show cause order as a result of any grievance filed with the Clerk, other than notice from a Court or state disciplinary body, if such grievance is patently frivolous or malicious. The Committee shall review the cause shown, if any, and shall make its recommendation to the full Court.

Any person who, before his or her admission to the Bar of this Court or during such person's disbarment or suspension, exercises in any action or proceeding pending in this Court any of the privileges of a member of the Bar, or who pretends to be entitled so to do, is guilty of contempt of Court and subject to appropriate punishment therefor.

APPENDIX E